

IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL REVISION APPLICATION NO. 25 OF 2005

1. Shri Xavier Fernandes,
s/o Joao Fernandes.
2. Shri Remet Fernandes,
s/o Joao Fernandes.
3. Shri Santiago Fernandes,
s/o Joao Fernandes.
4. Mrs. Cyrila Fernandes,
w/o Xavier Fernandes.
5. Mrs. Caitano Fernandes,
w/o Joao Fernandes.
6. Miss Soccorina Fernandes,
D/o Joao Fernandes,
All residents of House No.299,
Sawantawaddo, Kakoda,
Curchorem, Goa.

... Applicants

versus

State(through the Police
Inspector Incharge)
Curchorem Police Station,
Curchorem, Goa.

... Respondent

Mr. Zeller D'Souza, Advocate for the Applicants.

Ms. W. Coutinho, Public Prosecutor for the State.

CORAM : N. A. BRITTO, J.

DATE : 2ND FEBRUARY, 2006.

ORAL ORDER

Heard Mr. Zeller D'Souza, the learned Counsel on behalf of the applicants/accused who have been convicted and sentenced by the learned J.M.F.C., Quepem by Judgment/Order dated 10-2-2003 under Section 323 r/w 34 I.P.C. The applicants/accused no.1 to 3 have been sentenced to undergo 15 days S.I. and to pay a fine of Rs.750/- and in default to undergo 10 days S.I. and the applicants/accused no.4 to 6 have been sentenced to pay a fine of Rs.750/- in default to undergo 10 days S.I. The learned J.M.F.C. has also ordered payment of Rs.1000/- to each of the injured, namely P.W.1/Leopold, PW3/Rosario and PW6/Josephine by way of compensation, in case the fine is realized.

2. The applicants filed an appeal against the said conviction and sentence to the Court of Sessions and the learned Sessions Judge by his Judgment/Order dated 28-9-2005 was

pleased to dismiss the said appeal, ordering the accused to surrendering on 11-10-2005 to undergo the sentence.

3. The prosecution filed Criminal Appeal No.67/2003 against the sentence imposed upon the applicants/accused and it appears, from the reading of the Judgment of this Court dated 20-11-2003 that the prosecution had also questioned the acquittal of respondents/accused no.7 and 8. The said Criminal Appeal No.67/2003 for enhancement of sentence was dismissed by this Court on 20-11-2003. Apparently, the prosecution did not challenge the acquittal of the applicants/accused as regards the other Sections of I.P.C. for which they were charged.

4. It appears that the family of the applicants/accused and the family of the injured prosecution witnesses reside at a distance of about 10 metres or so and they have been on enimical terms. The incident resulting in filing of the charge-sheet under Sections 452, 326, 324, 323, 504, 506(ii) and 212 r/w Section 149 took place on 7-9-1966 at about 23.45 hours and the allegation against the applicants/accused was that accused nos.1 to 7 had formed an unlawful assembly and armed

with deadly weapons like iron rod, coita, etc. criminally trespassed into the house of the complainant/PW1/Leopold D'Costa and assaulted his brother PW3/Rosario D'Costa and sisters PW5/Salvacao and PW6/Josephine and accused no.8 harboured the applicants/accused who had committed the said offences.

5. The prosecution examined in all 13 witnesses including the medical officer, namely PW13/Dr.Jagdish Kakodkar in addition to the said complainant/PW1/Leopold, PW3/Rosario, PW5/Salvacao and PW6/Josephine. The applicants/accused belonged to one family, in that A-1 to A-3 are brothers and A-4 is the wife of A-1, and A-5 and A-6 are their sisters. Likewise, PW1/Leopold and PW3/Rosario are both brothers and PW5/Salvacao and PW6/Josephine are their sisters.

6. The learned trial Court framed three points for determination and point (b) is relevant for the purpose of this revision. It read as follows:-

"Whether the prosecution has been able to prove that accused

no.1 to 7 criminally trespassed in the house of the complainant and assaulted him and his family members?"

7. It has been rightly submitted by Mr. D'Souza, the learned Counsel of the applicants/accused that in answering point (b) no finding at all has been recorded by the learned J.M.F.C. whether there was at all any criminal trespass, namely whether offence under Section 452 I.P.C. was at all committed. The learned Sessions Judge in his Judgment rightly observed that there was prior enmity between both the families and that there were no independent eye witnesses to the occurrence of the incident and, therefore, a closer scrutiny of the evidence of the interested witnesses was required to be done, namely, with care and caution and after having done the same, the learned Sessions Judge came to the conclusion that the evidence of the said interested witnesses was convincing and there was no satisfactory explanation as to why their evidence was to be discarded. The learned Sessions Judge also found that the evidence of the said interested witnesses, namely PW1/Leopold, PW2/Rosario, PW5/Salvacao and PW6/Josephine was supported by the medical evidence of PW13/Dr. Jagdish Kakodkar who had

examined the said witnesses, and, proceeded to dismiss the appeal filed by the applicants/accused.

8. At the hearing of this revision petition, Mr. D'Souza has submitted that there was no finding recorded by the learned J.M.F.C. on point (b) framed by him and since the prosecution has failed to prove the offence of trespass under Section 452, the accused could not be convicted under Section 323 r/w 34 I.P.C. Mr. D'Souza has further submitted that none of the prosecution witnesses have made any categorical statement that the applicants/accused had entered the veranda or the house of the said complainant/PW1/Leopold. Mr. D'Souza has also submitted that there were no independent witnesses and in the light of lack of finding on point (b) framed by the learned J.M.F.C. the matter could be remanded with a direction to render such a finding.

9. On the other hand, Ms. W. Coutinho, the learned Public Prosecutor, on behalf of the State, has submitted that based on the evidence of the said interested witnesses, who belonged to one family, which was sufficiently corroborated by

the medical evidence, both the Courts below have convicted and sentenced the accused, as aforesaid and findings of facts, being concurrent in nature, there is no scope for interference by this Court. Ms. Coutinho has further submitted that the findings given by both the Courts below could not be termed to be perverse or suffering from any legal infirmity and, therefore, the said findings need not be interfered with, in revisional jurisdiction.

10. Although, there is no categorical statement in the evidence of the prosecution witnesses examined in the case that the accused had entered into the veranda of the house of PW1/Leopold it appears that the incident took place either in the veranda and or in the adjoining courtyard. The scene of offence panchanama as well as the evidence of PW2/Umesh Sawant shows that there were blood stains in the veranda of the house of PW1/Leopold. PW6/Josephine has also stated that A-1/Xavier Fernandes gave a danda blow on her brother PW3/Rosario due to which he fell down in the veranda. From the aforesaid evidence it could be safely incurred that the incident took place either in the veranda or at the door between the

veranda and the Courtyard of the house of PW1/Leopold. Although no finding has been given by the learned J.M.F.C. as regards offence under Section 452 I.P.C., the fact remains that impliedly all the accused stand acquitted therefrom and in such a situation no useful purpose would be served, by remanding the case to the learned J.M.F.C. to render a finding on that aspect of the case. Only because the applicants/accused have been acquitted under Section 452 or because the learned J.M.F.C. took no special care to record a finding on point (b) it cannot be inferred that the main case of the prosecution of assault is false. The injured prosecution witnesses as can be seen from the evidence of PW13/Dr. Jagdish Kakodkar were examined by him on the same night i.e. at 1.05 a.m. of 8-9-1996 and were found with simple injuries as described by him in his evidence as well as on the certificates produced by him at Exh.13/A colly. Both the Courts below have accepted the evidence of the interested witnesses because it was substantially corroborated by the medical evidence of PW13/Dr. Kakodkar and admittedly there were no independent eye witnesses. I do not find any glaring infirmity as regards the appreciation of the evidence of the said witnesses as far as the main story of assault under Section 323 is

concerned. In my view, the conviction of the applicants/accused considering the time at which the incident had taken place could not be faulted.

11. As far as the sentence is concerned, the learned J.M.F.C. has convicted A-1 to A-3 to 15 days S.I. and to pay a fine of Rs.750/- and as far as A-4 to A-6 they have been sentenced only to pay a fine of Rs.750/- in default to undergo S.I. of 10 days. It appears that the learned J.M.F.C. has directed A-4 to A-6 to pay a fine only because A-4 and A-6 were mothers and were having minor children and A-5 was an aged lady being the mother of A-1 to A-3. (In fact it appears from cause title that she is the sister of A-1 to A-3 and from para 12 of the Judgment that she had a small child, and, learned Counsel Mr. D'Souza has not been able to throw much light on the same). Mr. D'Souza has submitted that the incident took place almost 10 years back, namely on 7-9-1966 and considering the same the sentence imposed upon the applicants/accused be reduced to fine only.

12. The learned Public Prosecutor Ms. Coutinho has left the matter as regards sentence to my discretion.

13. Considering that the incident took place almost 10 years back and further considering that the applicants/accused have been convicted under Section 323 r/w 34 I.P.C. only, the rest of the prosecution story having been disbelieved, the sentence of 15 days S.I., as far as A-1 to A-3 are concerned, appears to be rather disproportionate. Ends of justice would be met by reducing the sentence imposed by the learned J.M.F.C. and as affirmed by the learned Sessions Judge. Consequently by way of sentence each of the applicants A-1 to A-3 shall pay a fine of Rs.1000/- (Rupees One Thousand only) and in default undergo S.I. for a period of 15 days. In case the fine is realized a sum of Rs.1000/- shall be paid each to PW1/Leopold, PW3/Rosario, PW5/Salvacao and PW6/Josephine as ordered by the learned J.M.F.C., as compensation.

14. In the light of the above, the revision partly succeeds. The conviction against the applicants/accused is maintained but the sentence is modified as stated herein above.

N. A. BRITTO, J.

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